

IN THE MATTER OF AN ARBITRATION

BETWEEN: **Kenora Association for Community Living**
(The Employer)

- and -

Ontario Public Service Employees Union, Local 702
(The Union)
Grievances of Angela Harasemchuk

BEFORE: R. Jack Roberts, Arbitrator

FOR THE UNION: Jim Gilbert
Grievance Officer

FOR THE EMPLOYER: Frederick J.W. Bickford
Counsel

HEARING: Kenora, Ontario
December 18, 2002

INTERIM AWARD

I. Introduction:

The grievances leading to this arbitration challenged as discriminatory the eligibility requirements for coverage under the employer's pension plan. The eligibility requirements were set forth in a contract between the employer and the insurer, Sun Life Assurance Company, dating back to 1982. At the outset of the hearing, counsel for the employer, Mr. Bickford, raised preliminary objections to jurisdiction and requested that the objections be addressed in an interim award prior to the introduction of any evidence on the merits.

The first objection was that the matter was inarbitrable under the pension plan provisions of article 17.03 of the collective agreement because article 17.03 did not incorporate into the collective agreement the terms of the pension plan. A second objection was that the matter was inarbitrable under the discrimination provisions of article 3 of the agreement because arbitrating the claim would inevitably involve reviewing the interpretation and application of the terms of the pension plan, which was something I did not have the jurisdiction to do.¹

¹ There was a third preliminary objection, which questioned whether, in addition to the traditional jurisdiction of arbitrators to interpret and apply the terms of a collective agreement, s. 48(12)(j) of the Ontario Labour Relations Code conferred upon them original jurisdiction to interpret and apply "human rights and other employment-related statutes." Given my resolution of the second issue herein, I have decided that this ground of objection need not be addressed. I merely note my understanding that the issue is unsettled and is now before the Supreme Court of Canada in a case derived, at least in part, from a decision of Arbitrator Paula Knopf in *Re District of Parry Sound Welfare Administration Board and OPSEU* (1999), Unpublished Award (Knopf).

For reasons which follow, the first objection is allowed but the second is dismissed. I find that I have jurisdiction to arbitrate the grievance under the discrimination provisions of article 3 the collective agreement.

II. Factual Background:

For purposes of the preliminary objection, the parties entered into an agreed statement of facts. It indicated that the grievor was hired by the employer on October 25, 1999, as a Temporary Nursery Aide. On June 22, 2000, the grievor accepted a written offer of employment from the employer for a Regular Part-Time Nursery Teacher-Aide position.

Six months later, on December 11, 2000, the grievor notified the employer of her intention to commence pregnancy and parental leave, effective January 19, 2001. Her projected date of return to work was about one year later, January 21, 2002. The grievor returned to work as projected and continued in her regular part time position for most of the remainder of 2002. In October, 2002, however, she notified the employer of her intention to commence a second pregnancy and parental leave, effective December 21, 2002. Her projected date of return from this leave will be some time in December, 2003.

This means that over the course of the grievor's employment, her two pregnancy and parental leaves left her with an up down, or sawtoothed, pattern of work. In 2000, the grievor was up. She worked 1,813.25 hours. In 2001, the grievor was down. Due to her first leave, she only worked 98.25 hours. In 2002, the grievor was up again. She worked most of the year. In

2003, she will be down again, with only one or two weeks of work available upon her return from her second leave, in December, 2003.

Sun Life apparently determined that the sawtoothed pattern of work experienced by the grievor made her ineligible for the employer's pension plan. The Group Pension Contract with Sun Life provided, in pertinent part, as follows:

Eligibility requirements in respect of an Employee who is in service on a continuous but less than full-time basis are such that Employee shall

- (a) have completed 24 months of continuous service, and,
- (b) have earned at least 35% of the Year's Maximum Pensionable Earnings or completed 700 hours of employment in each of the two consecutive calendar years immediately prior to membership in the plan.

Despite having been a regular part-time employee of the employer since June, 2000, the grievor apparently was found to be ineligible for coverage because she did not complete 700 hours of work in any two *consecutive* years. As a result, the employer was not called upon to~ make any pension contributions on her behalf.

On May 15, 2002, the grievor filed the two grievances leading to the present proceeding. They claimed that by not making pension contributions on her behalf, the employer discriminated against her in breach of the discrimination provisions of article 3 of the collective agreement; a letter of understanding appended to the collective agreement; the Ontario Human Rights Code; and, the Employment Standards Act. The essence of the claims was that the grievor was discriminated against on the basis of her sex and family status because the

determination of ineligibility was founded upon her intermittent absence from work for pregnancy and parental leave.

III. The Two Preliminary Objections:

(1) No incorporation of the pension plan into the collective agreement:

This issue may be dealt with in short order. There seems to be little doubt that the terms of the Group Pension Contract with Sun Life were not incorporated by reference into the collective agreement.

The sole pension plan provision of the collective agreement is found in article 17.03, which reads as follows:

17.03 The present pension plan shall remain in effect for the duration of this Collective Agreement.

To find that this brief provision incorporated the terms of the pension plan into the collective agreement, I would have to find that its wording indicated that the parties intended the employer to be directly liable on a claim for pension coverage or benefits and thereafter pursue its own consequential remedy against the insurer. *See Re Coca-Cola Bottling Ltd. and United Food & Commercial Workers International Union* (1994), 44 L.A. C. (4th) 151, at 156 (Swan).

There is no such indication in the wording of article 17.03, above. The provision does not make any reference to consideration by the employer of claims for coverage or benefits

under the pension plan. It merely requires the employer to keep the pension plan in effect, as it apparently had done since 1982. This has all the earmarks of an intention on the part of both parties to require claims for coverage or benefits to be considered by the insurer, with resort directly to the civil judicial system should the claimant and/or the union be dissatisfied with the outcome. There is nothing to confer upon an arbitrator original jurisdiction over the matter, in the sense of a jurisdiction originating in the collective agreement. The preliminary objection of the employer is allowed.

(2) Jurisdiction Under the Discrimination Provisions of Article 3 of the Agreement:

This is a more complex issue. In considering it, I begin with the following two premises:

(1) The collective agreement confers upon an arbitrator original jurisdiction over claims of discrimination by reason of sex or marital status. Under article 3.01 of the agreement, the parties said “that there will be no discrimination exercised or practised upon any person employed by the employer by reason of sex, or marital status;” and,

(2) Since the pension plan was not incorporated by reference into the collective agreement, an arbitrator cannot derive any original jurisdiction from the collective agreement to interpret or apply its terms, including its eligibility requirements;

These two premises lead to the question whether, nevertheless, an arbitrator at least has jurisdiction to decide if the employer discriminated against a grievor in breach of article 3.01 by entering into a pension plan that allegedly discriminates on the basis of sex or marital status. After considerable thought, I find that an arbitrator has this jurisdiction - even though the inquiry would necessarily involve reviewing the interpretation and application of those terms of the pension plan.

At the hearing, the representative of the union, Mr. Gilbert, cited two cases that supported this conclusion, *Re Chrysler Canada Ltd. and C.A. W.* (1996), 57 L.A.C. (4th) 81 (Kennedy); and, *Re Canada Safeway Ltd. and U.F.C. W.* (1996), 59 L.A.C. (4th) 405 (Alberta, Moreau). In the *Chrysler* case, several grievances challenged the denial of pension benefits to the same-sex partners of members of the bargaining unit. The terms of the pension plan were the subject of a longstanding agreement between the parties that never was considered to be part of the collective agreement. As a result, the collective agreement could not provide any original jurisdiction over the terms of the plan. Arbitrator Kennedy concluded, however, that he at least had jurisdiction to determine whether the absence of same-sex benefits in the pension plan breached the non-discrimination clause of the collective agreement, which was something over which he, indeed, had original jurisdiction. *See id.*, at 89.

In the *Safeway* case, *supra*, the insurer, Sun Life, determined that the grievor was ineligible for weekly indemnity benefits to cover absences due to medical complications associated with her pregnancy. As in the present case, the board of arbitration concluded that because the terms of the weekly indemnity plan were not incorporated into the collective agreement, it did not have original jurisdiction under the agreement to review their interpretation and application. *Id.*, at 424. Nevertheless, the majority of the Board went on to find that it had jurisdiction under the non-discrimination clause of the agreement “to determine whether the plan administrator, in exercising its functions to determine eligibility for weekly indemnity benefits, did so in a manner which was non-discriminatory and consistent with human rights laws and principles.” *Id.*, at 425.

The employer provided me with many cases in support of its submissions. None, however, repudiated the notion that arbitrators may possess the specific type of jurisdiction that I believe was found to exist in the above cases. For convenience, I will call it ancillary jurisdiction. It is a jurisdiction that is not “original,” in the sense of originating in the collective agreement. It is “ancillary,” in that it only arises when an issue outside the collective agreement must be decided in order to resolve a matter over which original jurisdiction exists. It is then that the issue has to be decided as an “ancillary” matter.

I find that I have jurisdiction to decide whether the employer discriminated against the grievor in breach of the non-discrimination provisions of article 3.01 of the collective agreement by entering into a pension plan with eligibility requirements that allegedly discriminated against the grievor on the basis of her sex or family status. My jurisdiction over the alleged breach of article 3.01 originates in the collective agreement. My jurisdiction to review the insurer’s interpretation and application of the eligibility requirements of the pension plan arises as an ancillary matter to this jurisdiction. Otherwise, it would be impossible to resolve the grievor’s article 3.01 claim. The preliminary objection of the employer is dismissed.

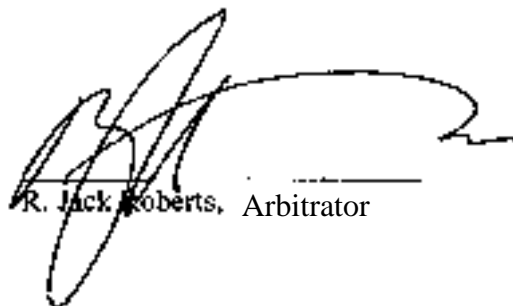
IV. Conclusion:

The first preliminary objection is allowed; the second is dismissed.

A hearing on the merits will be scheduled upon receipt of a request from either party. Because the insurer’s interpretation and application of the eligibility requirements of the pension plan will be reviewed for discriminatory effect in the event of a hearing on the merits, both parties are directed to notify Sun Life in writing of this prospect. I will permit Sun Life to

be represented as an intervenor in the hearing should it wish to participate.

Dated at Toronto, Ontario, this 23rd day of May, 2003.



R. Jack Roberts, Arbitrator